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University of Malaya v FBSM Ctech Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-1693–09 OF 2016
ROHANA YUSUF, ONG LAM KIAT AND ZALEHA YUSOF JJCA
17 APRIL 2018

C *Contract — Privity — Nexus — Main contractor appointed subcontractor to carry out works — Subcontractor appointed second subcontractor — Second subcontractor entered into various subcontract agreements with other subcontractors — Main contract termination led to termination of subcontract between subcontractor and second subcontractors — Second subcontractor sued employer and main contractor — Whether there was privity of contract between second subcontractor and employer*

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The appellant, University of Malaya Medical Centre ('UMMC'), appointed Technitium Sdn Bhd ('the second defendant') as the main contractor to carry out works at UMMC. Via a letter of award ('the LOA'), the second defendant appointed the respondent ('the plaintiff') as its subcontractor. The plaintiff entered into agreements with various other subcontractors. UMMC terminated the principal agreement with the second defendant which led to the termination of the LOA. The plaintiff filed a suit against the second defendant for payment under the LOA and successfully obtained a judgment against the latter which resulted in its winding up. The plaintiff commenced an action against UMMC and the second defendant on the ground that the plaintiff obtained sanction to represent the second defendant to sue and recover monies payable by UMMC to the second defendant. UMMC filed an application at the High Court to strike out the plaintiff's claim but the application was dismissed. Hence, the present appeal by UMMC on the grounds that: (a) there was no privity of contract between UMMC and the plaintiff; and (b) the liquidator of the second defendant could not sanction the plaintiff as a creditor to initiate legal action in its own name or on behalf of the company in liquidation.

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Held, allowing appeal:

I (1) There was no contractual nexus between the plaintiff and the first defendant. The relationship between the parties was a classic example of a contractual agreement where the employer appointed the main contractor and the main contractor appointed a subcontractor to under a particular project of the employer. The contractual relationship is defined

separately as between the employer and the main contractor and the main contractor and its subcontractor (see para 14).

(2) The plaintiff had no cause of action against the first defendant as there was no privity of contract between them. The law relating to companies liquidation does not empower a liquidator to sanction any creditor to sue on behalf of a company in liquidation. The claim of the plaintiff against UMMC should stand struck out (see para 19).

[Bahasa Malaysia summary

Perayu, Pusat Perubatan Universiti Malaya ('UMMC'), melantik Technitium Sdn Bhd ('defendan kedua') sebagai kontraktor utama untuk menjalankan kerja-kerja di UMMC. Melalui satu surat award ('LOA'), defendan kedua melantik responden ('plaintif') sebagai subkontraktornya. Plaintif memeterai perjanjian dengan pelbagai subkontraktor lain. UMMC menamatkan perjanjian utama dengan defendan kedua yang seterusnya menyebabkan penamatan LOA. Plaintif memfailkan saman terhadap defendan kedua untuk mendapatkan bayaran bawah LOA dan berjaya mendapatkan penghakiman terhadap defendan kedua yang kemudian menyebabkan penggulungannya. Plaintif memulakan tindakan terhadap UMMC dan defendan kedua atas alasan plaintif memperoleh kebenaran untuk mewakili defendan kedua untuk menyaman dan mendapatkan semula wang yang perlu dibayar oleh UMMC kepada defendan kedua. UMMC memfailkan permohonan di Mahkamah Tinggi untuk membatalkan tuntutan plaintif tetapi permohonan ini ditolak. Oleh itu, rayuan ini oleh UMMC atas alasan: (a) tidak ada priviti kontrak yang sah antara UMMC dan plaintif; dan (b) pelikuidasi defendan kedua tidak boleh membenarkan plaintif, sebagai pemiutang, untuk memulakan tindakan undang-undang atas nama sendiri atau bagi pihak syarikat dalam likuidasi.

Diputuskan, membenarkan rayuan:

(1) Tiada hubungan kontrak antara plaintif dan defendan pertama. Hubungan antara pihak-pihak tersebut merupakan contoh klasik perjanjian kontrak di mana majikan melantik kontraktor utama dan kontraktor utama melantik subkontraktor bawah projek tertentu milik majikan. Hubungan kontrak ditentukan secara berasingan antara majikan dan kontraktor utama dan kontraktor utama dan subkontraktornya (lihat perenggan 14).

(2) Plaintif tidak mempunyai sebarang kausa tindakan terhadap defendan pertama kerana tidak ada priviti kontrak antara mereka. Undang-undang berkaitan syarikat pembubaran tidak memberi kuasa kepada pelikuidasi untuk membenarkan mana-mana pemiutang untuk menuntut bagi pihak syarikat dalam likuidasi. Tuntutan plaintif terhadap UMMC sepatutnya ditangguhkan (lihat perenggan 19).]

Notes

For cases on privity in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6332–6379.

Cases referred to

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)

Housing and Development Board v Lee Sem Yoong Sdn Bhd [1987] 2 MLJ 204; [1987] 1 LNS 30, SC (refd)

Nadarajah a/l Konthandapany & Anor v N Oothaya Suriyan a/l Nadarajah (Vasu a/l Karupiah & Ors, interveners) [2016] MLJU 1234; [2016] 1 LNS 174, HC (refd)

Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal [2014] 4 MLJ 85, CA (refd)

Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (distd)

Legislation referred to

Companies Act 1965 ss 236, 236(2)(a), (3)
Rules of Court 2012 O 18 rr 19, 19(1)(b), (1)(d)

Fahri Azzat (Nurul Rafeeza Hamdan with him) (Fahri & Co) for the appellant.
Vincent Lim (Emily Wong with him) (Dennis Nik & Wong) for the respondent.

Rohana Yusuf JCA:

[1] This appeal is lodged by the first defendant UMMC against the decision of the learned High Court judge at Kuala Lumpur, who had dismissed its application for striking out under O 18 r 19 of the Rules of Court 2012. We have heard the appeal and have allowed the appeal of the first defendant for the claim of the plaintiff against the first defendant be struck out.

[2] We note that the contractual relationship between the parties in this suit are these. The first defendant UMMC, appointed the second defendant Technitium Sdn Bhd as the main contractor to supply, deliver, install, test and commission Total Hospital Information System ('THIS') at University Malaya Medical Centre ('UMMC'). This was made pursuant to a written contract dated 8 April 2006 ('the principal agreement').

[3] The second defendant subsequently appointed the plaintiff FBSM Ctech Sdn Bhd, as its subcontractor pursuant to a letter of award dated 28 April 2006. Under this letter of award, a back to back payment arrangement was

made between the second defendant and the plaintiff where any payment due to the plaintiff under the letter of award would only be paid to the plaintiff, upon the second defendant's receipt of payment from the first defendant UMMC.

[4] The plaintiff subcontractor, thereafter entered into agreements with various other subcontractors namely; IBA Health (M) Sdn Bhd, Agfa Healthcare Corp, Century Software and, TOMMS, to undertake the performance under the letter of award.

[5] The first defendant UMMC, terminated the principal agreement with the second defendant as its main contractor by a letter dated 1 January 2010 which led to the termination of the letter of award by the second defendant with the plaintiff subcontractor on 5 April 2010.

[6] The plaintiff subcontractor meanwhile filed a Civil Suit No D-22NCC–1017 of 2010 against the second defendant main contractor, for payment under the letter of award. The plaintiff obtained judgment against the second defendant which resulted in the latter's subsequent winding up vide a winding up order dated 18 June 2012.

[7] The plaintiff commenced this action against both the first defendant UMMC as well as the second defendant, main contractor Technitium (in liquidation). From the pleadings it appears that the claim made by the plaintiff against the first defendant is purely on the basis that the plaintiff has obtained sanction to represent the second defendant to sue and recover monies payable by the first defendant to the second defendant, then in liquidation.

[8] The first defendant UMMC filed an application in the High Court encl 6, under O 18 r 19(1)(b) and (d) of the Rules of Court 2012, to strike out the plaintiff's claim against it. The learned High Court judge dismissed the application on the following grounds. According to Her Ladyship there was sufficient privity of interest between the plaintiff and the first defendant UMMC, following the first defendant's execution of the principal agreement with the second defendant; that the nexus and the parties' privity of interest' disclose some causes of action which raise questions fit to be decided in a full hearing.

[9] On appeal against that decision the first defendant UMMC, raised two main grounds. First there is no privity of contract between the first defendant UMMC with the plaintiff and secondly the liquidator of the second defendant cannot sanction the plaintiff as a creditor, to initiate a legal action in its own name for or on behalf of the company in liquidation.

[10] We have examined closely the reason propounded by the learned trial judge, at para 6.4 where it was decided as follows:

> 6.4 Despite Plaintiff not being a party to the Principal Agreement, I find sufficient privity of interest between the Plaintiff and the 1st Defendant in the 2nd Defendant's award of contract to the Plaintiff following the 1st Defendant's execution of Principal Agreement with the 1st Defendant. The nexus and, parties' privy disclose some cause of action and, raise question fit to be decided in a full hearing. The mere fact that the Plaintiff's case is weak and, not likely to succeed at the trial is no ground for the Writ to be struck out summarily.

[11] It is noted from the grounds of judgment that the learned trial judge did acknowledge that there was no privity of contract between the first defendant and the plaintiff. However, despite that finding the learned judge proceeded to hold that there was 'sufficient privity of interest' between them. Her Ladyship found the second defendant's subcontracting the contract to the plaintiff, following the first defendant's execution of principal agreement with the second defendant had created a relationship between the first defendant UMMC with the plaintiff. In short the learned judge said because the plaintiff and Technitium ('the second defendant') signed their subcontract after Technitium signed the principal agreement with the first defendant, there somehow arose 'privity of interest' between them.

[12] The reasoning by the learned trial judge is contradictory to the settled legal position and the concept of privity of contract. The trial judge had misapprehended what 'privity of interest' is and had assumed that it is somehow related to 'privity of contract'. The phrase 'privity of interest' is a term of art used in relation to res judicata in order to consider whether the issues raised or the matters dealt in one case previously, binds a litigant in another case. That kind of litigant in a case, normally has a privity of interest with the previous issue of case which may invite the application of *res judicata* (see *Nadarajah a/l Konthandapany & Anor v N Oothaya Suriyan a/l Nadarajah (Vasu a/l Karupiah & Ors, interveners)* [2016] MLJU 1234; [2016] 1 LNS 174; *Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal* [2014] 4 MLJ 85 (CA), *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062 (CA)).

[13] To find that the phrase 'privity of interest' may create 'some cause of action' is not known in law. This term 'privity of interest' cannot alter the fact that there is no privity of contract between the two parties. It is also not clear what exactly the 'some causes of action' that Her Ladyship had in mind as it was not articulated in the grounds of judgment. In any case 'privity of interest' was not pleaded in the statement of claim and neither was it raised as a point of submission. It is trite that parties cannot raise issues which are not pleaded.

[14] What we found clear is that there is no contractual nexus between the plaintiff and the first defendant. The relationship between the parties in this case in fact, is a classic example of a contractual arrangement, where the employer appointed the main contractor, and the main contractor appointed a subcontractor to undertake a particular project of the employer. The contractual relationship are normally defined separately as between the employer and the main contractor, and the main contractor with its subcontractor.

[15] Since privity of contract clearly applies only as between the first defendant with the second defendant as the main contractor, unless the main contractor had assigned, novated, or sold its chose in action to the plaintiff, it cannot sue in its own name for and on behalf of the second defendant.

[16] There is nothing in the statement of claim which pleaded any assignment, novation or the transfer of a chose of action by the second defendant against the first defendant to the plaintiff. Neither is there a pleaded case which is premised on a transfer of beneficial or legal interest in its chose of action by the second defendant to the plaintiff (see *Housing and Development Board v Lee Sem Yoong Sdn Bhd* [1987] 2 MLJ 204; [1987] 1 LNS 30 (SC)). As such, there is nothing that can confer any authority on the plaintiff to pursue any claim on behalf of the second defendant against the first defendant.

[17] The learned High Court judge had further decided that:

> As to the issue of whether the Plaintiff can be validly given the sanction by the 2nd Defendant's liquidators to commence legal proceedings on its behalf, the asset and liability of a limited company vest in the liquidators upon its liquidation. Accordingly, the sanction is well within the 2nd Defendant's liquidators' jurisdiction. In this respect, however, the Court is also empowered to provide sanction to authorize other person to institute action.

Her Ladyship found that the liquidator of the second defendant, is authorised to 'sanction' the plaintiff which was a creditor that wound up the second defendant, to sue the first defendant on its behalf in its own name. There is no law that says a liquidator's powers as contained in s 236 of the Companies Act 1965 can allow a liquidator to 'sanction' a creditor to take out and action for and on behalf of a wound up company (see s 236(3) of the Companies Act 1965). In this regard we found the learned trial judge had failed to appreciate what sanction is, and the ambit of a liquidator's powers under the Companies Act.

[18] The plaintiff sought to rely on the Federal Court decision in *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 to justify that

A it can sue the first defendant. *Zaitun Marketing* however, is a case decided on a completely different point. It was held in that case that a liquidator did not have to first obtain authority from the court or the committee of inspection, to exercise the powers to appoint a lawyer to initiate, continue or defend a claim under s 236(2)(a) of the Companies Act. It was not a decision on whether a
B private liquidator can give sanction to a creditor to initiate a legal suit in its own name for and on behalf of the wound up company.

[19] From the appeal records before us we find it plain and clear that the plaintiff has no cause of action against the first defendant as there is no privity
C of contract between them. The law relating to companies liquidation does not empower a liquidator to sanction any creditor to sue on behalf of a company in liquidation. For these reasons, we have no hesitation to allow the appeal by the first defendant and make an order that the claim of the plaintiff against the first defendant should stand struck out.

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[20] We therefore allow the appeal of the first defendant, and set aside the order by the learned trial judge. Consequently, we allow the application of the first defendant under O 18 r 19 of the Rules of Court. Hence, the claim by the plaintiff against the first defendant is struck out.

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Appeal allowed.

Reported by Afiq Mohamad Noor

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